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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
[Sacramento Division]

AREZOU MANSOURIAN; LAUREN MANCUSO; CHRISTINE WING-SI NG
,
Plaintiffs,

vs.

BOARD OF REGENTS OF THE UNIVERSITY OF CALIFORNIA AT DAVIS; LAWRENCE "LARRY" VANDERHOEF; GREG WARZECKA; PAM GILL-FISHER; ROBERT FRANKS; and LAWRENCE SWANSON,
Defendants

CASE NO. S-03-2591 FCD EFB

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

Date: **July 27, 2007**
Time: **10:00 a.m.**
Courtroom: **2**

Complaint filed: December 18, 2003
Trial Date: June 17, 2008

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I. INTRODUCTION

Plaintiffs Mansourian, Mancuso, and Ng are former female university wrestlers who filed this civil rights action in December 2003 seeking relief for ongoing violations of federal and state civil rights laws arising from discrimination by the Regents of the University of California and university administrators against women athletes at the University of California at Davis ("UCD"). Defendants' Motion for Judgment on the Pleadings is an improper piecemeal attack on the pleadings, which fails on all fronts. In addition to raising several arguments that have already been rejected by this Court in this case, defendants continue to misapprehend the scope of plaintiffs' Complaint and the basic principles that guide federal civil rights laws, misconstrue or ignore the multitude of discriminatory practices on which plaintiffs base their claims for relief, and misapply the law related to public policy torts, remedies, and immunity. The motion should be denied in its entirety.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Beginning in the 1990s, varsity wrestling at UCD included both men and women. Women wrestlers at UCD received highly qualified coaching, wrestled using women's freestyle rules rather than men's collegiate rules, and received all of the benefits of varsity status. Complaint at ¶¶ 82, 85, Olivier Decl., Exh. A. UCD sponsored a women's division in its annual Aggie Open wrestling tournament. *Id*. at ¶. 83. Some women wrestlers from UCD went on to become nationally ranked and compete at a high level nationally and internationally. *Id.* at ¶¶ 85-88.

The Regents of the University of California are charged with overseeing the administration and operation of UCD, including its athletics program. *Id.* at ¶¶ 13-15, 23. The individual defendants, Larry Vanderhoef, Robert Franks, Greg Warzecka, Lawrence Swanson and Pam Gill-Fisher are responsible for the day-to-day administration of UCD and its athletic program. *Id.* ¶¶ 16, 18-20. They are also the individuals responsible for managing the wrestling program and ensuring non-discrimination in the athletic program. *Id.*

Plaintiffs are women wrestlers, who wrestled throughout high school and attended UCD, in large part, to wrestle. *Id.* at ¶¶ 26, 29, 37, 38, 55. During their tenure at UCD, Mansourian and Ng participated in varsity wrestling until UCD administrators abruptly forced all women out of the wrestling program. *Id.* at ¶¶ 30, 56-60. Prior to that, Mansourian and Ng received coaching by UCD's head wrestling using women's freestyle rules. *Id.* at ¶ 82. They also received all of the benefits usually bestowed upon varsity athletes at a university including health insurance, medical and athletic training services, academic tutoring services, strength and conditioning coaching,

laundry services, and access to varsity training facilities. *Id.* at ¶¶ 33, 51.

In the Fall of 2000, Mansourian and Ng, completed the requirement to become eligible to participate in varsity wrestling and began attending wrestling practice. *Id.* at ¶ 59. Thereafter, they were informed that defendants had terminated all athletic participation opportunities for female, but not for male, wrestlers. *Id.* at ¶ 60. Defendants barred Mansourian and Ng from the wrestling and other varsity facilities, and withdrew all of their varsity benefits. *Id.* at ¶¶ 61, 62. Mansourian and Ng, along with other women wrestlers at UCD, met with defendant Warzecka, the UCD Athletic Director, to request reinstatement of the women's wrestling team. He refused and instead suggested that they form a women's wrestling club team at their own expense. *Id.* at ¶ 63. As club team members, they would receive none of the benefits that had previously received as varsity athletes. *Id.* The women wrestlers also reached out to UCD Chancellor Larry Vanderhoef, but he refused to meet with them. *Id.* at ¶ 64. In addition, UCD terminated Coach Burch. *Id.* at ¶ 73.

In the Spring of 2001, having exhausted their efforts within UCD to reinstate their status as varsity athletes, Mansourian and Ng filed a complaint with the United States Department of Education's Office of Civil Rights ("OCR"). *Id.* at ¶ 67. In June 2001, after significant media attention, student protests, and the involvement of a California state assemblywoman, defendants promised to fully reinstate women's wrestling athletic participation opportunities. *Id.* at ¶¶ 71-75.

In the fall of 2001, Mansourian and Ng arrived at wrestling practice expecting to participate in the wrestling program. They were joined by Lauren Mancuso who had enrolled in UCD intending to participate in varsity wrestling and had obtained athletic financial assistance. All three athletes had completed the eligibility requirements for varsity wrestlers, and were deemed eligible. *Id.* at ¶¶ 37-41, 75. The new wrestling coaches, however, ignored them. When the women complained, defendants informed them that they could only participate in wrestling if they could beat the male wrestlers using men's collegiate wrestling rules. *Id.* at ¶¶ 75-77. This had never been a condition of women's participation in wrestling at UCD. *Id.* at ¶¶ 78, 82.

At all times relevant to this action, UCD has offered substantially more athletic participation opportunities and more athletic financial assistance to male students than to female students. Id. at ¶¶ 129, 140. In addition, UCD does not have a history or continuing practice of athletic program expansion. Id. at ¶ 131. Instead, UCD eliminated opportunities for women athletes by forcing women wrestlers out of the varsity wrestling program despite their

interest in, and prior participation in, varsity wrestling at UCD. Id. at ¶ 66. UCD also eliminated athletic financial assistance by withdrawing the athletic scholarship to Lauren Mancuso, and by denying Mansourian, Ng and Mancuso the benefits of varsity status. *Id.* at ¶¶ 40, 61-62.

The Complaint was filed on December 18, 2003 and asserts six claims for relief: (1) violation of Title IX for failure to provide equal athletic opportunities to women; (2) violation of Title IX for failure to provide equal athletic financial assistance to women; (3) retaliation in violation of Title IX; (4) violation of 42 U.S.C. sec. 1983 based on the equal protection clause of the U.S. Constitution; (5) violation of the California Unruh Civil Rights Act; and (6) violation of public policy based upon the California Constitution and the California Education Code. Docket #1.

Defendants filed a Rule 12(b)(6) motion on March 5, 2004 (Docket # 13-15), which was denied on May 6, 2004. Docket # 18-21, 25. There has been a substitution of plaintiffs' lead counsel in the case and discovery continues. Docket # 125, 137, 140, 143, 149. On January 24, 2007, the Court issued the 2nd Amended Status (Pretrial Scheduling) Order. Docket #156. Plaintiffs then moved for leave to amend the Complaint to add additional plaintiffs and related allegations. Docket ## 158-161. The Court denied plaintiffs' motion. Docket # 175. Plaintiffs subsequently voluntarily dismissed the class allegations of the Complaint. Defendants filed the instant motion on June 5, 2007. Docket # 188.

III. ARGUMENT

A. The Standard for a Motion for Judgment on the Pleadings Is a High Standard, Particularly in Civil Rights Cases, Which Defendants Cannot Overcome.

Like a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a motion for judgment on the pleadings pursuant to Rule 12(c) must be denied "unless it appears to a certainty that no relief under any state of facts in support of his claim. *Mostowy v. United States*, 966 F.2d 668, 672 (Fed. Cir. 1992) (noting standard is "stringent"); *Qwest Communications Corp. v. City of Berkeley*, 208 F.R.D. 288, 291 (N.D. Cal. 2002.) (noting standard same under Rule 12(b)(6) and Rule 12(c).) Defendants must establish that *no material issue of fact* remains to be resolved and that they are entitled to judgment as a matter of law. *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1550 (9th Cir. 1989). A court must assume the truthfulness of the material facts alleged in the complaint and construe all inferences reasonably drawn from these facts in favor of the responding party. *General Conference Corp. of Seventh-Day Adventists v. Seventh-Day Adventist Congregational Church*, 887

F.2d at 230; *Hal Roach Studios,* 896 F.2d at 1550. Defendants are not entitled to judgment if the complaint raises issues of fact which, if proven, would support recovery. *Id.* at 230. This standard is applied with "particular strictness" in civil rights cases. *Shechter v. Comptroller of City of New York,* 79 F.3d 265, 270 (2d Cir. 1996).

In addition, the court may only consider the facts stated within the four corners of the complaint. The court may not examine any external facts, unless they are facts that are subject to judicial notice under Federal Rules of Evidence rule 201.[1] *Lee v. City of Los Angeles,* 250 F.3d 668, 688 (9th Cir. 2001); *R.J. Corman Derailment Servs., LLC v. International Union of Operating Engineers Local 150,* 335 F.3d 643, 647 (7th Cir. 2003).

Rule 12(c) does not specifically authorize a motion for partial judgment on the pleadings. Cases allowing partial judgment on the pleadings have been limited to judgment as to an entire count. *See, e.g., Moran v. Peralta Cmty. Coll. Dist.*, 825 F. Supp. 891, 893 (N.D. Cal. 1993); *In re Amica, Inc.*, 130 B.R. 792, 796 (Bankr. N.D.Ill. 1991.) Thus, a Rule 12(c) motion cannot be used to parse claims for relief and remedies or to strike less than an entire count. Finally, the law prefers resolution on the merits and that cases be "tried on the proofs rather than the pleadings," *Renni & Laughlin, Inc. v. Chrysler Corp.*, 242 F.2d 208, 213 (9th Cir. 1957).

B. Defendants' Attempt to Recast its Second Elimination of Plaintiffs from Varsity Athletics as a Lawful Act Does Not Support Judgment on the Pleadings as to Any of Plaintiffs' Claims.

Much of defendants' motion hinges on the argument that their second elimination of plaintiffs from the wrestling program in the Fall of 2001 by requiring that women wrestle and beat the men using men's collegiate rules was a lawful act. From this false assertion, defendants argue that plaintiffs' federal claims are time barred, because the "lawful" second elimination ended defendants' discrimination against plaintiffs, such that there is no "continuing violation" and plaintiffs' claims as to defendants' earlier acts of discrimination are rendered untimely.

At its core, this argument is the very same that this Court rejected when it denied defendants' motion to dismiss over three years ago. The Court held then that defendants could not defeat plaintiffs' Complaint by parsing portions of plaintiffs' claims. Docket #25, pp. 13-14. Further, the Court specifically held that any argument that portions of plaintiffs' federal claims may be barred by the applicable statute of limitations must be raised in a *motion for summary judgment*. *Id.* Defendants ignore this mandate, however, and again seek dismissal based upon

[1] Though defendants seek judicial notice of a number of documents, the requests are improper or otherwise not determinative of this motion for the reasons set forth below and in Plaintiffs' Opposition to Defendants' Request for Judicial Notice, filed herewith.

plaintiffs' pleadings. Defendants' argument continues to fail for several reasons.

1. The Second Elimination Is But One of Many Unlawful Acts that Support Plaintiffs' Claims of Discrimination.

Defendants urge the Court to "dismiss all claims based on the 'second elimination' (i.e. the Fall 2001 tryouts)." See Defs' MPA at 5. None of plaintiffs' claims, however, are based solely on this act. Rather, as the Court noted the first time it denied defendants' motion to dismiss, this act is one of many unlawful acts in a policy and practice of discrimination by defendants. Docket #25, pp. 12-16.

Defendants cannot seek dismissal of only portion of a claim. *See In re Amica,* 130 B.R. at 796. Plaintiffs allege that defendants have violated their civil rights because from the moment defendants refused to allow women to wrestle in the varsity program, defendants began to discriminate against plaintiffs on the basis of their gender. That discrimination continued each and every day that plaintiffs attended UCD because women's wrestling opportunities were never reinstated as they had existed. As detailed in the Complaint and summarized above, defendants' discrimination took several forms, included multiple acts on discrimination, constituted a policy and practice of discrimination, and continues to this day. Importantly, *all* of this discrimination was against the backdrop of defendants' *ongoing* discrimination against women because it was failing, and continues to fail, to provide equal athletic opportunities and athletic financial assistance to women throughout the UCD athletic program. Olivier Decl., Exh. A, ¶¶ 129, 131, 140. Indeed, defendants were in violation of Title IX even before they eliminated women's wrestling. Id. Thus defendants' second elimination was but one example of the discrimination plaintiffs have had to endure. Plaintiffs' claims, therefore, do not rise or fall upon defendants' second elimination of plaintiffs from the wrestling program.

2. Defendants Cannot Establish as a Matter of Law on the Pleadings that the Second Elimination of Plaintiffs from Varsity Athletics Was Lawful.

Although the only facts before the Court on this motion are those that were considered on the prior Rule 12(b)(6) motion defendants now claim that those allegations establish that their conduct was lawful. Specifically, defendants claim that the decision to require plaintiffs to wrestle and beat male athletes on the team using men's collegiate rules in order to participate in varsity wrestling was a lawful, nondiscriminatory policy. This argument that such a policy is lawful because it "treats women the same as men" is disingenuous at best.

First, as this Court noted, defendants' act in the Fall of 2001 to "allow" plaintiffs to participate in wrestling

was under "different conditions – conditions that plaintiffs allege prevented them from participating in wrestling." Docket #25 at p. 11. Defendants *changed* their behavior toward women wrestlers in a manner that increased the discrimination, already prevalent at UCD, against women in athletics. Olivier Decl., Exh. A at ¶¶ 75-78, 82. Previously, defendants had maintained a varsity's wrestling program in which women practiced and competed only against women using freestyle as opposed to collegiate rules. Id. at ¶¶ 82, 85. Defendants removed all women from the program in 2000, and then a year later allowed them back on the team only if they could meet the new conditions. Not only were defendants' actions part of a continuing discriminatory scheme against women in athletics at UCD, but they were also in retaliation for plaintiffs complaining about discrimination in athletics at UCD. Id. at ¶¶ 154-158.

Second, requiring that women compete against men in a contact sport generally applicable to men, in order to have a varsity athletic opportunity, is hardly non-discriminatory. If such a policy were generally permitted there would be a substantial risk that boys would dominate the girls thereby denying them a *real opportunity* to compete. This is precisely why courts have repeatedly upheld separate but equal athletic programs under Title IX as constitutionally permissible. *See, e.g., O'Conner v. Bd. of Educ.*, 449 U.S. 1301 (1980).

The cases cited by defendants provide them no support. Most stand for the unremarkable proposition that the Constitution and federal civil rights laws require equal treatment of the sexes and involve women and men competing against each other in non-contact sports or at young ages before size and strength difference between male and female become an issue. *See Fortin v. Darlington Little League, Inc.*, 514 F.2d 344 (1st Cir. 1975) (holding that prohibiting girl from trying out for boys' little league baseball violated equal protection); *Brenden v. Independent Sch. Dist.*, 477 F.2d 1292 (8th Cir. 1973) (holding that high school failed to demonstrate a rational basis for excluding women from non-contact men's sports teams). *None* of the cases stand for the proposition that a university that had previously provided separate women's athletic opportunities acted in a nondiscriminatory manner by suddenly requiring women to compete against men. *See, e.g., Lantz v. Ambach*, 620 F. Supp. 663, 665-66 (S.D.N.Y. 1985) (where no separate team, girl must be allowed to try out for boys' junior varsity football team); *Hoover v. Meiklejohn*, 430 F. Supp. 164, 171 (D.Colo. 1977) (where no separate girls' soccer team, school obligated to allow girls to try out for boys' team or to field separate teams).

Third, defendants improperly attempt to use documents from the OCR as evidence in support of their claims

that the second elimination policy is lawful. These documents are not the proper subject of judicial notice and may not be relied on by defendants as support of their version of an ultimate issue in this case. See Plts' Opp. to Defs' RJN, filed concurrently herewith. The OCR documents do not provide an evidentiary basis for the argument in any case. The documents are inadmissible hearsay under Federal Rules of Evidence 801. In addition, several OCR letters merely reflect a decision to close the complaint files without a full investigation or consultation with plaintiffs, after voluntary action taken by defendants. OCR does not conclude the absence of discrimination or retaliation. Moreover, any such finding would not be determinative here. *Rowinsky v. Bryan Independent School District*, 80 F.3d 1006, 1015-1016 (OCR findings accorded little weight); *Philbrook v. Ansonia Bd. of Education*, 757 F.2d 476, 481 (2d Cir. 1985) (probable cause by an administrative agency not determinative).

3. Plaintiffs' Federal Claims Are Timely.

Defendants further argue that plaintiffs' federal claims are time barred, because the "lawful" second elimination ended defendants' discrimination against plaintiffs, such that there is no "continuing violation" and plaintiffs' claims as to defendants' earlier acts of discrimination are rendered untimely. The second elimination of plaintiffs from varsity wrestling is not lawful as a matter of law. Thus, defendants' timeliness argument fails. Further, to the extent that defendants claim that the second elimination was the final "act" upon which plaintiffs' claims could accrue, the Court has already decided this very issue in plaintiffs' favor.

In their first motion to dismiss, defendants argued that the last of defendants' actions which could form the basis for plaintiffs' claim for damages occurred in the Fall of 2001, when defendants required plaintiffs to meet the new conditions in order to participate in varsity wrestling.[2] The Court held, however, that plaintiffs do not allege discrete acts of discrimination, but instead allege a policy and practice of discrimination such that the statute of limitations does not turn on a specific act of defendants:

> "Defendants' argument ignores other allegations of plaintiffs' complaint. Plaintiffs Mansourian [and Mancuso] are current UCD students who are currently being subjected to defendants' allegedly sex discriminatory practices. [Citations.] As UCD students, their claims accrue each and every day they are denied equal access to athletic participation and scholarship opportunities. [Citations.] At the time plaintiffs filed the instant complaint, plaintiffs allege they should have been wrestling for UCD and receiving all the varsity benefits and scholarships provided to male wrestlers, but defendants refused, and continue to refuse, to date, to allow their participation. They have thus stated facts sufficient to withstand a motion to dismiss, regardless of what statute of limitations applies." Docket #25, p. 12:1-13.

[2] Plaintiffs incorporate by reference their opposition to defendants' motion to dismiss in 2004, which remains fully applicable to defendants' repeated arguments here. Docket # 98.

Similarly, the Court held that although plaintiff Ng had graduated at the time the Complaint was filed, because her graduation date is not on the face of the Complaint, and because "the Court must accept the facts stated in the complaint as true, and must construe them in favor on Ng, the court must likewise deny the motion to dismiss as to her since there is a set of facts in which her claim would survive." Docket #25, p. 13.

Both holdings remain as applicable now as they were when this Court first issued them. Moreover, the Court in its order specifically stated that any further argument related to the statute of limitations must be raised in a *summary judgment motion*, not in yet another motion to attack the pleadings. Docket #25, pp. 9-16. Defendants' blatant disregard for this Court's order warrants summary denial of its motion for judgment on the pleadings.

Moreover, defendants continue to misconstrue the proper limitations analysis. Defendants were failing to provide equal athletic opportunities to women even before they barred plaintiffs from the wrestling program. For purposes of the statute of limitations, plaintiffs had a right each and every day of their enrollment at UCD to equal access to educational benefits. Thus plaintiffs' claims began to accrue at least as early as defendant's termination of women's wrestling at UCD in the Fall of 2000 and continued to accrue until they left UCD.

The applicable limitations period for Title IX and for § 1983 actions is governed by California's general personal injury statute. *See Stanley v. Trustees of the California State Univ.*, 433 F.3d 1129, 1136 (9th Cir. 2006) ("Title IX claims are subject to the applicable state statute of limitations for personal injury actions."); *Azer v. Connell*, 306 F.3d 930, 935 (9th Cir. 2002) (§ 1983 actions governed by state statute of limitations for personal injury actions). Defendants erroneously cite to *Stanley* to argue that the statute of limitations is one year. The Ninth Circuit in *Stanley* held, as is consistent with "every other federal circuit to consider this issue," that "Title IX claims are subject to the applicable state statute of limitations for personal injury actions." *Stanley*¸ 433 F.3d at 1135-36.

California's personal injury statute of limitations was amended to extend to two years. See Cal. Code Civ. Proc. 335.1. As this Court has already held in this case on this issue, section 335.1 "extend[s] the limitations period of an actionable claim if the extension occurs before the claim for relief becomes time barred under the old limitations period." Docket #25, p. 11, citing *Douglas Aircraft Co. v. Cranston*, 58 Cal. 2d 462, 465 (1962)); *see also Lamke v. Sunstate Equipment Co.*, 387 F. Supp. 2d 1044, 1052 (N.D.Cal. 2004) ("[t]he extension of the statutory period within which an action must be brought [here, from one year to two] is generally held to be valid if made *before* the cause of action is barred.") (citation omitted); *Thompson v. City of Shasta Lake*, 314 F. Supp. 2d

1017, 1024 (E.D.Cal. 2004) (same).

Section 335.1 became effective on January 1, 2003. Thus, as long as the claim accrued on January 2, 2002 or later, the two year statute of limitations applies. And, because the Complaint was filed on December 18, 2003, any such claims are timely. Moreover, even if a one year statute of limitations applies, the claim is timely if it accrued on or after December 18, 2002.[3] Plaintiffs Mansourian and Mancuso were still students at UCD when the Complaint was filed and their claims are therefore timely. Plaintiff Ng had graduated, but as noted above, her graduation date is not stated on the face of the Complaint. As this Court has already held, any argument regarding the statute of limitations, therefore, has to be raised in a motion for summary judgment. Docket #25, p. 13.

D. Plaintiffs Have Properly Pled a Retaliation Claim Under Title IX.

The Supreme Court has explicitly recognized a cause of action for retaliation under Title IX. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005). To establish such a claim, plaintiffs must show that they were retaliated against because they complained of sex discrimination. *Id.* at 184 and 1510. Plaintiffs have alleged facts, which if accepted as true and construed in their favor, adequately support their claim that defendants unlawfully retaliated against them. In particular, plaintiffs have alleged that they repeatedly complained and protested about Defendants' failure to comply with Title IX based on their sex and that defendants retaliated against them by refusing to reverse their decision to eliminate women from the wrestling program, reneging on their subsequent promise to reverse their decision, firing the wrestling coach who supported and trained women wrestlers, and forcing plaintiffs and other women wrestlers to compete against and beat men under different rules – conditions that had never previously been imposed – in order to participate in varsity wrestling. Olivier Decl., Exh. A, ¶¶ 151-158.

Despite these allegations, defendants argue once again that plaintiffs' retaliation claim is untimely and that it is barred as a matter of law because just one of the above allegations references a third party, Coach Burch. Neither argument has merit. The Court has already rejected defendants' argument that plaintiffs' Title IX retaliation claim is time barred and defendants have failed to state any legal basis that would bar plaintiffs' retaliation claim -- *even if* the only allegation underlying such claim was based on defendants' termination of plaintiffs' coach. Finally, Defendants' efforts to parse out just one factual basis for plaintiffs' retaliation claim should fail because it would not

[3] Any statute of limitations also would be equitably tolled while plaintiffs sought administrative relief through the OCR. *Daviton v. Columbia/HCA Healthcare Corp*., 241 F.3d 1131 (9th Cir. 2001); *Lucchesi v. Bar-O Boys Ranch*, 353 F.3d 691 (9th Cir. 2003).

bar the claim in its entirety as a matter of law.

1. The Court Has Already Ruled that Plaintiffs' Retaliation Claim Is Timely.

This Court has already rejected defendants' argument, made again here, that plaintiffs' retaliation claim is time barred because no retaliation occurred *after* plaintiffs engaged in the protected activity of filing the OCR complaint in the Spring of 2001. Defendants misapprehend plaintiffs' allegations: the protected activity is *not* limited to the OCR complaint but extends to plaintiffs' complaints to UCD about its discrimination. Olivier Decl., Exh. A, ¶¶ 151-153. In addition, as the Court noted previously: "As to the retaliation claim in particular, plaintiffs allege defendants retaliated against them and continue to retaliate against them by, among the other [specific retaliatory acts alleged in the Complaint], continuing to refuse and failing to treat female athletes, especially wrestlers, equitably." Docket #25, p. 12, fn. 10. For these very same reasons, defendants' Rule 12(c) motion on the timeliness argument should be denied.

3. Plaintiffs' Retaliation Claim Is Based on the Personal Harm Plaintiffs Suffered, Including Coach Burch's Termination.[4]

Plaintiffs' retaliation claim seeks to redress the harm they personally suffered as a result complaining about the discrimination they experienced based on their sex. This harm includes plaintiffs being "denied their civil right to enjoy an equal opportunity to participate in varsity athletics and to receive athletic financial assistance." Olivier Decl., Exh. A, ¶ 160. Courts have determined that the harm Title IX plaintiffs suffer as a result of losing the benefits accorded to women athletes who compete interscholastically can be irreparable. *See, e.g., Choike v. Slippery Rock University of Pennsylvania*, 2006 WL 2060576 at *9 (lost opportunities to "develop skill, self confidence, learn team cohesion and sense of accomplishment, increase their physical and mental well-being, and develop a life long healthy attitude"). Plaintiffs here also suffered emotional distress, lost self-esteem, and humiliation as a result of defendants' retaliation. Olivier Decl., Exh. A, ¶¶ 135, 146, 160.

Despite plaintiffs' clearly pled claims of personal harm, defendants seek to bar plaintiffs' retaliation claim because they lack "third party standing." Defendants argue that plaintiffs do not meet the criteria to seek redress for injuries done to others, referencing Coach Burch and citing cases that are inapposite to the circumstances underlying

[4] Once again, defendants improperly ask this Court to parse portions of plaintiffs' claims and subject them to judgment on the pleadings. Plaintiffs have alleged multiple retaliatory actions in support of their retaliation claim, only one of which is firing coach Burch. Defendants are not entitled to judgment on only a portion of a particular claim. See, e.g., *In re Amica, Inc.*, 130 B.R. at 796.

plaintiffs' claims.[5] This argument fails as it is based on the clearly erroneous assumption that plaintiffs are seeking to redress the injury suffered by Coach Burch.

Defendants argue in the alternative, that "even if plaintiffs contend that they are seeking redress for injuries *done to them* resulting from Burch's departure, the retaliation claim still lacks merit." Defs' MPA at 8. Neither case upon which defendants rely supports this claim. In *Shaposhikov v. Pacifica Sch. Dist.*, 2006 WL 931731 (N.D. Cal. 2006), the Court ruled that plaintiff's allegations of retaliation -- that defendants were too lenient on a student sexual harasser – related to actions that did not involve the plaintiff and therefore were not actionable under Title IX. Here, the removal of Coach Burch had an immediate, severe and direct impact upon plaintiffs who were deprived of the physical training and moral support Coach Burch provided each of them individually, a deprivation that continued when the replacement coach not only refused to train and support plaintiffs but imposed even greater barriers to their being able to participate in wrestling. Olivier Decl., Exh. A, ¶¶ 75-79, 151-158. *Choike* also does not assist defendants, as it did not involve students being directly harmed by the coach's termination but rather involved a coach's claim that a school's elimination of the teams he coached violated Title IX. 2006 WL 2060576. The court reasoned there that the loss of his coaching job was not the result of intentional discrimination *directed* at plaintiff but a "mere by-product" of their decision to eliminate the teams. Here, the decision to terminate Burch was not a "mere by-product" of defendants' decision to eliminate the women's wrestling team because the job he performed continued to exist and defendants hired a new coach to replace him. Moreover, plaintiffs allege that fired Coach Burch in direct retaliation for plaintiffs' complaints of discrimination.

Undaunted, defendants assert that in order to state a claim for retaliation based upon Burch's firing, plaintiffs must also demonstrate that Burch's firing was a "materially adverse employment action." Defendants' suggestion that a termination is not "materially adverse" is nonsensical.[6] Moreover, to the extent that what defendants are attempting to argue is that Burch's termination must be "materially adverse" to plaintiffs, (1) defendants have failed to offer any law to support this assertion; and (2) plaintiffs have sufficiently alleged that

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[5] *Lowrey v. Texas A&M*, 117 F.3d 242, 251 (5th Cir. 1997) and *Hankerson v. Thomas County Sch. Dist*. 2005 U.S. Dist. LEXIS 25576 *7-8 (M.D. Ga. 2005) are irrelevant to the analysis of plaintiffs' retaliation claim on behalf of themselves because they involve claims brought by coaches on behalf of their students.

[6] Defendants rely upon Title VII law for this argument. But the inquiry there is entirely different: courts evaluating whether an adverse employment action is retaliatory look to whether it is "materially adverse" as a measure of the severity of the action taken against the plaintiff. *See, e.g., Ray v. Herndeson*, 217 F.3d 1234, 1243 (9th Cir. 2000).

Burch's termination was material in that it caused plaintiffs further harm.

To the extent that "materiality" is relevant to any inquiry at all, it would be in the context similar to the First Circuit's adaptation of Title VII's retaliation framework to the education context. There, the Court held that retaliation claims include four elements: (1) plaintiffs engaged in protected activity; (2) alleged retaliator knew of protected activity; (3) alleged retaliator subsequently undertook some disadvantageous action against plaintiffs; and (4) retaliatory motive played a substantial role. *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 67 (1st Cir. 2002). Plaintiffs specifically alleged facts in the Complaint sufficient to make a showing of retaliation under these four elements: (1) plaintiffs complained about gender discrimination in athletics and the removal of women wrestlers to UCD adminstrators and to the OCR through formal complaints; (2) defendants knew of plaintiffs' protected activity; (3) defendants subsequently withdrew their promise to reinstate women's wrestling, imposed conditions on women wrestlers that effectively barred them from participating, terminated their coach, and continued to refuse to provide equal athletic opportunities each day plaintiffs remained as students as UCD; and (4) defendants' adverse actions were in direct response to and were intended to discriminate against plaintiffs in retaliation for the exercise of their rights under Title IX. Olivier Decl., Exh. A, ¶¶ 60-79, 151-158. To assert that this harm to plaintiffs, which was so shocking as to draw the attention of the media, the state legislature, and fellow students, is not a materially adverse action is not only spurious but also raise a material issue of fact. It cannot be a basis for judgment on the pleadings.

Finally, defendants' policy arguments are equally unpersuasive. First, defendants' suggestion that allowing plaintiffs' claim to proceed would subject schools to hundreds of lawsuits claiming the effect of a discriminatory personnel decision is hyperbolic fantasy and, in any event, is unsupported by its legal argument that "federal funding recipients could not have contemplated such liability in accepting federal funds." Defs' MPA at 8. To the extent a school's retaliatory actions are taken against a teacher *and* a student, as is the case here, the school is liable to the student, as well as the teacher, under Title IX. *See, e.g., Jackson*, 544 U.S. at 182 (stating that "funding recipients have been on notice that they could be subjected to private suits for intentional sex discrimination under Title XI since 1979"). Having agreed to comply with Title IX and its federal regulations and having accepted and spent federal Title IX funding, Defendants cannot avoid the obligations to which it previously agreed by now arguing that plaintiffs' claim that Coach Burch's firing was one of several retaliatory acts against plaintiffs is an invalid exercise of the spending clause. Indeed, it would offend every principle of equity to permit Defendants to enjoy the benefits

and at the same time avoid the terms of Title IX. Defendants' alternative policy argument, that allowing plaintiffs to seek redress based on Coach Burch's termination would require a "trial within a trial" regarding whether his departure constituted an adverse" action, is unsupported by any authority.

E. Plaintiffs Have Properly Pled a § 1983 Claim.

Plaintiffs assert a claim against defendants under 42 U.S.C. § 1983 for violation of the equal protection clause of the U.S. Constitution. Defendants' assertion that this claim is subsumed by Title IX is incorrect. The significance and practical importance of § 1983 cannot be understated. It was "intended to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights." *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 700-701 (1978).

Federal rights are presumptively enforceable under § 1983. This presumption may be defeated only in exceptional cases by showing clear congressional intent to restrict plaintiffs to the set of remedies that are available under the violated statute itself, thereby precluding § 1983 enforcement. *See City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 120 (2005); *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981).

The Supreme Court has found a statutory scheme to bar enforcement of rights under § 1983 in only three cases, all of which are fundamentally different than the claims before this Court. In *Sea Clammers*, the Court found that the "unusually elaborate enforcement provisions" of two federal environmental laws that "created so many specific statutory remedies" suggested that Congress did not intend to preserve a § 1983 right of action based on the federal statute (as opposed to any constitutional right). 453 U.S. at 20-21. In *Smith v. Robinson*, 468 U.S. 992 (1984), the Supreme Court foreclosed a § 1983 action because it found that Congress intended that the Education of the Handicapped Act to be the "exclusive avenue" through which a plaintiff may assert those claims. *Id.* at 1009. In *Rancho Palos Verdes*, the Supreme Court barred reliance on § 1983 to enforce the Telecommunications Act of 1996 based on the "detailed scheme" and "limited remedies" of the statute and the legislative history that suggests Congress intended TCA to be an exclusive remedy. 544 U.S. at 120. Significantly, the Court stated that the determinative inquiry is whether Congress intended the statute at issue to be the exclusive remedy such that it is incompatible with enforcement under § 1983. *Id.*

To be clear, plaintiffs' § 1983 claim is based on the equal protection clause, *not* on their rights under Title

IX. Although the Ninth Circuit has not ruled on the issue, three other circuits have expressly held that a plaintiff's 1983 claim based on the equal protection clause is not subsumed by Title IX. As the Eighth Circuit found: "To the extent that [plaintiff's] § 1983 claims are premised on alleged violations of the Equal Protection Clause, we believe that the application of *Sea Clammers* to her claims is plainly inapposite. *Sea Clammers* in no way restricts a plaintiff's ability to seek redress via § 1983 for the violation of independently existing constitutional rights, even if the same set of facts also gives rise to a cause of action for the violation of statutory rights." *Crawford v. Davis*, 109 F.3d 1281, 1284 (8th Cir. 1997); *see also Seamons v. Snow*, 84 F.3d 1226, 1233 (10th Cir. 1996) (plaintiff has independent rights under Title IX and under § 1983 for violations of constitutional rights); *Lillard v. Shelby County Bd. of Educ.*, 76 F.3d 716, 722- 23 (6th Cir.1996) (plaintiff's § 1983 action did not purport to gain remedies unavailable under Title IX, but instead sought to enforce distinct and independent substantive due process rights.)

The holdings of these Circuit Courts are further supported by the fact that there is no evidence of Congressional intent to make Title IX the exclusive or even a comprehensive remedy for a plaintiff asserting a claim of discrimination based on gender. As the Eighth Circuit held in finding that plaintiff was entitled to pursue her Title IX claim both independently and under § 1983:

> To the extent that [plaintiff's] § 1983 claims are based on alleged violations of Title IX, we find unpersuasive the defendants' argument that Title IX contains a "sufficiently comprehensive" remedial scheme. The only enforcement mechanism that Title IX expressly provides is a procedure to terminate federal support to institutions that violate Title IX. See 20 U.S.C. § 1682; see also *Cannon v. Univ. of Chicago*, 441 U.S. 677, 683, 99 S.Ct. 1946, 1950, 60 L.Ed.2d 560 (1979). This is a far cry from the "unusually elaborate enforcement provisions" of the statutes at issue in *Sea Clammers*, 453 U.S. at 13, 101 S.Ct. at 2622, which expressly provided for citizen suits and enforcement by government agencies. By holding that Title IX contains not only an implied private right of action, *Cannon*, 441 U.S. at 709, 99 S.Ct. at 1964, but also a damages remedy, *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 76, 112 S.Ct. 1028, 1038, 117 L.Ed.2d 208 (1992), moreover, the Supreme Court has indicated that the sole express enforcement mechanism contained in Title IX is not exclusive. We believe, therefore, that there is no evidence that Congress intended to foreclose the use of § 1983 to redress violations of Title IX. *Crawford*, 109 F.3d at 1284.

Moreover, plaintiffs' Title IX claims substantially differ from their claims under § 1983, in that courts have found violations of the equal protection clause but not Title IX. *See, e.g., Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 732-33 (1982) (striking down female-only nursing school policy under Equal Protection Clause, while noting that it might not violate Title IX).

Further, the reasoning of the Circuits that reached the opposite conclusion is unpersuasive. Each of those

cases reads *Sea Clammers* as applying whenever a remedial scheme is available elsewhere. *See e.g, Bruneau ex rel. Schofield v. South Kortright Cent. School Dist*. 163 F.3d 749, 758 (2nd Cir. 1998); *Pfeiffer v. Marion Ctr. Area Sch. Dist.*, 917 F.2d 779, 789 (3d Cir.1990).[7] As *Rancho Palos Verdes* recently made plain, the proper inquiry is whether Congress intended the statutory scheme to be the *only* remedy available to plaintiff. *Rancho Palos Verdes*, 544 U.S. at 120. Indeed, the Second Circuit noted in its analysis that "plaintiff had a constitutional right," but then held that Title IX provides the exclusive remedy. *Bruneau*, 163 F.3d at 758. Title IX, however, does not provide a remedy for constitutional rights. That is the province of § 1983.

E. Plaintiffs Have Properly Pled a Violation of California Public Policy.

1. Plaintiffs Allege Multiple Sources of California's Public Policy.

Defendants improperly seek dismissal of plaintiffs' single public policy cause of action by addressing separately each Constitutional or statutory provisions on which it is based and arguing, as to each, that it does not provide a private right of action. A Rule 12(c) motion must dispose of an entire cause of action. *See Moran*, 825 F. Supp. at 893; *In re Amica, Inc*., 130 B.R. at 796.

Further, it is not the specific statute or regulation that forms the basis for the tort, but the underlying policy reflected in it. *Green v. Ralee Eng'g Co.*, 19 Cal. 4th 66 (1998). Courts have consistently upheld tort claims based on California's public policy against discrimination. *See, e.g., Stevenson v. Super. Ct.*, 16 Cal. 4th 880 (1997) (Fair Employment and Housing Act declares a fundamental public policy against age discrimination); *Rojo v. Kliger*, 52 Cal. 3d 65 (1990) (California Constitution (Art. 1, § 8) declares a fundamental public policy against sex discrimination). Plaintiffs have pled allegations sufficient to satisfy the following requirements:

> First, the policy must be supported by either constitutional or statutory provisions. Second, the policy must be "public" in the sense that it "inures to the benefit of the public" rather than serving merely the interests of the individual. Third, the policy must have been articulated at the time of the discharge. Fourth, the policy must be "fundamental" and "substantial."

Stevenson, 16 Cal. 4th at 890.

Plaintiffs' Complaint provides two sources of public policy—California Constitution and Education Code—and both of these sources meets the prerequisites set forth above. As to each, plaintiffs make the necessary

[7] *Travis v. Folsom Cordova Unified Sch. Dist.*, 2007 U.S. Dist. Lexis 11566 (E.D. Cal. 2007) is inapposite. There, the court considered whether Title VI subsumed a sec. 1983 claim based on Title VI, not based on the equal protection clause as is the case here.

allegations described above. For instance, the Complaint cites to California Constitution Article 1, Section 7, which states "this amendment is necessary to serve compelling public interests." *Id.* at ¶ 183. The Complaint also relies upon the Education Code, which states it is the intent of the Legislature that "opportunities for participation in athletics be provided equally to male and female pupils" and that "opportunities for participation in intercollegiate athletic programs. . . in the campuses of the University of California be provided on as equal a basis as is practicable to male and female students." *Id. at* ¶¶ 187, 189. These statutes clearly establish the fundamental and substantial public policy against gender discrimination.

The Complaint further alleges that defendants violate public policy by treating male and female students differently by (1) failing to provide female students with equal athletic participation opportunities; (2) failing to provide female students with equal athletic financial assistance; and (3) providing male but not female students with participation opportunities in the sport of wrestling." Olivier Decl., Exh. A, ¶ 196.

4. Public Policy Torts Do Not Require That a Private Right of Action Exist in Constitutional or Statutory Provisions that Form the Basis of the Public Policy Tort.

Defendants' argument that the sections of the Education Code and California Constitution on which plaintiffs rely for their public policy claim do not contain a private right of action is misdirected. Because plaintiffs' claim is a tort claim, not a statutory claim, it does not depend upon a showing that the Constitutional and statutory provisions from which the public policy emanates also authorize a private right of action. When a legislative provision embodying a public policy is enacted for the protection of a particular class of persons, as is the case here, its violation may give rise to civil liability to an injured plaintiff who is a member of the class. *Hudson v. Craft*, 33 Cal. 2d 654 (1949).

Even assuming a private right of action is necessary, plaintiffs have an implied right of action under the Education Code and the Constitution. California courts have applied two separate but similar tests to imply a private right of action: (1) "legislative intent;" and (2) "Restatement 2d." *See, e.g., Crusader Ins. Co. v. Scottsdale Ins. Co*., 54 Cal. App. 4th 121 (1997). Both tests consider factors such as whether a private right to sue is "appropriate" and "needed." *Id*. It is clear from the language in the constitutional and statutory provisions California has created to prohibit gender discrimination that California law is intended to increase statewide compliance with Title IX, not simply to enact a toothless clone of the federal law. The California Legislature

expressly stated with respect to the Education Code, that "[w]hile significant progress has been made since the passage of Title IX [of the Education Amendments] in 1972, the numbers indicate that female athletes are still not provided equal athletic opportunity at many high schools, colleges, and universities throughout the state." Section 1 of Stats. 2002, ch. 1060 (A.B. 2295), as amended by Stats. 2003, ch.62 (S.G. 600), § 345. Therefore, a private right of action is appropriate and necessary to ensure the effectiveness of the law.

5. Defendants' Private Right of Action Argument Is No More Availing When Made Specifically on Behalf of the Individual Defendants.

Relying principally on *Reynolds v. Bement,* 36 Cal. 4th 1075 (2005), defendants argue that, even where a private right of action is authorized, "there still remains the question" of whether individual agents or employees are liable "under that statute." Defs' MPA, p. 16. The very manner in which defendants phrase the argument reveals its flaws. As stated above, plaintiffs' claim for violation of public policy is a tort claim, based upon the important public policy, against discrimination in education. Accordingly, the question is not whether there is a private right of action for violation of a specific statute, but whether the defendants engaged in tortious conduct in violation of public policy.

Moreover, the individual defendants in *Reynolds* against whom the plaintiffs sought liability had not engaged in any actions themselves in violation of the statute in question. They were merely officers, directors and shareholders of the corporate employer. Plaintiff sought to impose individual liability for the employer's wage and hour violations on such persons by virtue of their positions, rather than their conduct, based upon a broad definition of "employer" adopted by the Industrial Welfare Commission. The Court rejected that definition as a basis for identifying the scope of persons who would be individually liable under the statute. At the same time, the Court acknowledged that "directors may be 'jointly liable with the corporation and may be joined as defendants if they personally directed or participated in the tortious conduct.'" *Reynolds,* 36 Cal. 4th at 1089-90. Here, the individual defendants are not merely officers or agents of the Regents but are individuals who, were directly involved in and participated in the conduct which constituted the violation of public policy.

Nor does *Thornburg v. Superior Court,* 138 Cal. App. 4th 43 (2006) support defendant's position. That case sought to establish statutory liability, not tort liability. Moreover, the conduct at issue in *Thornburg* consisted of charging patients an excessive amount for copying medical records. The court specifically found that the public interest there was not so vital as to assume that the legislature intended to impose liability on every agent or

employee of the defendant. *Id. at* 51. Here, by contrast, the public interest in preventing gender based discrimination is fundamental and substantial.

The only other case involving California public policy on which defendants rely for their argument that individuals cannot be held liable for violations of such policy is *Reno v. Baird*, 18 Cal. 4th 640, 660, 663 (1998), in which the Supreme Court held that individual supervisors are not liable for employment discrimination either under FEHA or violation of public policy. *Id.* at 663. However, the specific language of the statute limited liability for discrimination to an "employer" while imposing liability for retaliation and harassment on employers and other "persons." The Court found individual supervisors were not "employers" under FEHA for the purpose of discrimination claims. It also determined that it would be incongruous to impose tort liability on a class of persons who the legislature excluded from statutory liability for the same conduct. *Id.* at 650-51, 664. This rationale is inapplicable here. The law relied upon by plaintiffs for their public policy claim is silent as to who might not be liable. Instead, it makes clear that it is a fundamental public policy of California that discrimination in education be eliminated and that "each Californian, regardless of ethnic origin, race, gender, age, disability, or economic circumstance" be given "a reasonable opportunity to develop fully his or her potential." There is no reason to believe that the tortious violation of this policy by an individual is any less egregious, or any less actionable, when engaged in by individuals than when engaged in by an institution.

F. Plaintiffs Have Properly Requested Emotional Distress and Punitive Damages.

Even when courts allow partial judgment on individual causes of action as opposed to an entire action, a prayer for relief is not considered part of the cause of action for purposes of testing the sufficiency of the pleading. *See* 5 Wright & Miller, *Federal Practice and Procedure* § 1255 (3d ed. 2004); *In re Amica, Inc.*, 130 B.R. at 796. Accordingly, plaintiffs' requested remedies of emotional distress damages and punitive damages under Title IX are not properly subject to dismissal on a Rule 12(c) motion.

3. Plaintiffs Have Properly Requested Emotional Distress Damages Under Title IX.

Title IX provides plaintiffs with an implied private cause of action and entitles plaintiffs to compensatory damages, especially where, as here, there are allegations that the defendants' discrimination was intentional. *Franklin*, 503 U.S. 60. The Supreme Court in *Franklin* set forth broad parameters of relief: **"**where legal rights

have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Id.* at 66.

Defendants' argument that plaintiffs are not entitled to emotional distress damages because Title IX was enacted pursuant to the Spending Clause and therefore limited to contractual remedies is in error. In *Gebser v. Lago Vista Independent Sch. Dist.*, 524 U.S. 274 (1998) and *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999), the Supreme Court analyzed the scope of liability under Title IX and affirmed the availability of compensatory damages – which necessarily include emotional distress damages -- despite the fact that Title IX is partially derived from the Spending Clause.[8] In both cases, the Court reasoned that Title IX described sexual harassment with sufficient clarity to provide adequate notice to school officials that they could be liable for this form of discrimination, thereby satisfying the notice requirement of Spending Clause legislation. Here, plaintiffs' allegations regarding their denial of Title IX opportunities directly track the language of Title IX, thereby placing defendants on notice of their potential liability. Moreover, unlike back pay and other economic damages that are equitable in nature, *see, e.g.*, *Franklin*, 503 U.S. at 1038, emotional distress damages are considered compensatory damages in the civil rights context. Defendants concede this point in their reliance on *Barnes v. Gorman*, 536 U.S. 181, 187 (2002) which notes that under "Title IX, which contains no express remedies, a recipient of federal funds is nevertheless subject to suit for compensatory damages…."

Defendants further concede that emotional distress damages are available even as a contractual remedy where serious emotional distress is a particularly likely result. Defs' MPA at 11. Emotional distress damages are also available in contract when the aggrieved party is subjected to more than economic damages. *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 426 (2003); *Erlich v. Menezes*, 21 Cal. 4th 543, 558-59 (1999). Plaintiffs allege that they experienced significant harm at the hands of defendants. Olivier Decl., Exh. A, ¶¶ 120, 146. Defendants contend that plaintiffs' emotional distress was not severe enough to warrant compensation under a contractual analysis. This is a factual dispute that cannot be decided on the pleadings.

4. Plaintiffs Have Properly Requested Punitive Damages Under Title IX.

Defendants' argument that punitive damages are not available under Title IX as a matter of law is incorrect. At least one court has left open the possibility that punitive damages may be available under Title IX to serve public

[8] The Court in *Franklin* refused to reach the question of which congressional power was used to enact Title IX. *Id.* at 75 n.8.

policy. *See Doe v. Oyster River Co-op. Sch. Dist.*, 992 F. Supp. 467, 483 (D.N.H. 1997). Also, some courts have recognized that punitive damages awards are available under section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 704, a statute whose enforcement regime, as well as legislative history, closely tracks that of Title IX. *See, e.g., Pandazides v. Virginia Bd. of Educ.*, 13 F.3d 823, 830-32 (4th Cir. 1994); *Hernandez v. City of Hartford*, 959 F.Supp. 125, 133-34 (D.Conn. 1997).

G. The Individual Defendants Are Not Entitled to Immunity as a Matter of Law.

Defendants argue that the actions of the individual defendants in this case involved "a discretionary, as opposed to a ministerial" decision, and that they are, therefore, immune from liability under California Government Code § 820.2. The California Supreme Court has long established, however, that the issue of whether discretionary immunity applies requires a policy based analysis, based upon the underlying purpose of immunity, rather than a mechanical or literal approach of determining whether discretion was involved. *Johnson v. State*, 69 Cal.2d 782, 795 (1968).

The sole purpose of discretionary immunity is to prevent judicial inquiry into sensitive policy decisions of government employees that are best left to agencies other than the courts. *Johnson*, 69 Cal. 2d at 795 n.8. Thus, immunity only applies for those, "'basic policy decisions [which have] . . . been [expressly] committed to coordinate branches of government,' and as to which judicial interference would thus be 'unseemly.'" *Caldwell v. Montoya*, 10 Cal. 4th 972, 981 (1995). The proper approach to determining whether discretionary immunity applies, therefore, requires that a court "find and isolate those areas of quasi-legislative policy-making which are sufficiently sensitive to justify a blanket rule that courts will not entertain a tort action alleging that careless conduct contributed to the governmental decision." *Johnson*, 69 Cal. 2d at 794. "Accordingly, to be entitled to immunity the [defendant] must make a showing that such a policy decision, consciously balancing risks and advantages, took place." *Id.* at 795 n.8. Defendants here concede that this is the proper standard. Defs' MPA at 19.

Defendants have made no such showing here and cannot do so. The only support defendants offer for their argument that the individual defendants "consciously balanced risks and advantages" of any decision on which this action is based is the reference to a handful of allegations in the Complaint, none of which assert any facts regarding the process by which the defendants decided to take the actions they did against plaintiffs. Based upon these allegations, including the fact that defendants' conduct engendered media and legislative attention, and unspecified

"evidence provided via judicial notice," defendants urge this court to accept the remarkable conclusion that there is "no doubt that defendants made discretions decisions with respect to plaintiffs' demands after much deliberation and in light of many external factors . . ." That conclusion is mere wishful thinking on defendants' part. Nothing in the Complaint or in the materials submitted by defendants establishes that any conscious balancing of risks and advantages actually occurred. Nor are defendants' stated "ultimate facts and conclusions of law" sufficient to establish discretionary immunity. *Neary v. Regents of Univ. of Cal.*, 185 Cal. App. 3d 1136, 1143 (1986); *Runyon v. Super. Ct.*, 187 Cal. App. 3d. 878, 882 (1986). Thus, simply asserting that defendants made decisions in light of external factors does not establish that their conduct was the result of a weighing of risks and advantages.

Additionally, even where a government employee's actions involve complex decisions which require the exercise of skill and judgment, they do not enjoy discretionary immunity unless they constitute basic policy decisions rather than the implementation of a basic policy already formulated. *Barner v. Leeds*, 24 Cal. 4th 676, 685 (2000). In *Barner*, the Supreme Court noted that the scope of the discretionary act immunity "should be no greater than is required to give legislative and executive policymakers sufficient breathing space in which to perform their vital policymaking functions." *Id.* at 685. Thus, routine duties which are a part of the normal operations of the employee's office or position are not discretionary, while basic policy decisions made at the planning stage of operations qualify employees for immunity. *Taylor v. Los Angeles Dep't of Water & Power*, 144 Cal. App. 4th 1216, 1238-39 (2006).

Similarly, even where discretion, as that term is commonly used, is actually exercised, immunity under § 820.2 does not apply unless such discretion in exercised in the context of a basic policy decision. *Barner*, 24 Cal. 4th at 685. Here, defendants' actions were ministerial in nature because they were contrary to the existing policies designed to promote equal opportunities for women in athletic programs. Defendants' actions were operational decisions, not part of the Regents' "basic policy decisions" made at the "planning" stage, and they contravened existing policies established by the California Legislature through the California Education Code and Congress through Title IX. They did not entail "quasi-legislative" determinations of any kind. Accordingly, holding the individual defendants accountable for their tortious actions would not involve the type of judicial oversight that the Legislature feared in enacting § 820.2.

IV. CONCLUSION

For all of the reasons stated herein, defendants' motion for judgment on the pleadings should be denied.[9]

DATED: July 13, 2007

Respectfully Submitted,

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[9] If the Court is inclined to grant defendants' motion, in whole or in part, plaintiffs request leave to amend their Complaint. Federal policy strongly favors determination of cases on their merits. *Foman v. Davis*, 371 U.S. 178, 182 (1962).